

ORIGINAL

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

PETER C. WOLFF, JR. 2332
Federal Public Defender
District of Hawaii

SEP 10 2003
at 12 o'clock and 0 min. M
WALTER A.Y.H. CHINN, CLERK

DONNA M. GRAY 4519
Assistant Federal Public Defender
300 Ala Moana Boulevard, Suite 7104
Honolulu, Hawaii 96850
Telephone: (808) 541-2521
Facsimile: (808) 541-3545
Email: fpdhi@hotmail.com

Attorneys for Defendant
JOHN ANDREW GILBREATH

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) CR. NO. 03-00106 DAE
)
Plaintiff,) APPLICATION FOR ISSUANCE OF
)
) SUBPOENA
vs.)
)
JOHN ANDREW GILBREATH,)
)
Defendant.)
)

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APPLICATION FOR ISSUANCE OF SUBPOENA

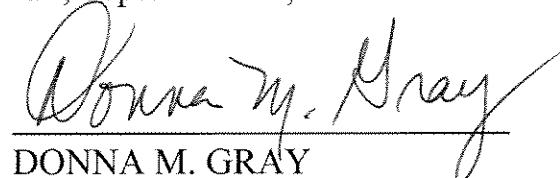
Defendant, JOHN ANDREW GILBREATH, through counsel,
DONNA M. GRAY, Assistant Federal Defender, hereby applies to this
Honorable Court for an order issuing subpoenas to Jordan Lowe, Gordon
Horiye, Ty Torco and Gery Graham, Special Agents with the U. S. Department

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of Justice, Bureau of Alcohol, Tobacco & Firearms, for the District of Hawaii, so that said witnesses may appear in the above-entitled matter to testify at a hearing on Defendant's Motion to Suppress Evidence and Statements scheduled for hearing on September 18, 2003 at 9:00 a.m., before the Honorable David A. Ezra.

This application is made pursuant to Rule 17(b) and (c) of the Federal Rules of Criminal Procedure and 28 C.F.R. § 16.22, et seq. This application is based upon the attached affidavit of counsel and declaration.

DATED: Honolulu, Hawaii, September 10, 2003.



DONNA M. GRAY
Attorney for Defendant
JOHN ANDREW GILBREATH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 03-00106 DAE
)	
Plaintiff,)	DECLARATION OF COUNSEL
)	
vs.)	
)	
JOHN ANDREW GILBREATH,)	
)	
Defendant.)	
)	

DECLARATION OF COUNSEL

I, DONNA M. GRAY, hereby declare as follows:

1. I am counsel for Defendant, JOHN ANDREW GILBREATH, having been appointed pursuant to the Criminal Justice Act.
2. Federal Rule of Criminal Procedure 17(b) and (c) expressly authorizes this Court to order or authorize the issuance of subpoenas for service upon a witness either to require the witness to appear in court and/or for the production of documents upon a satisfactory showing 1) the Defendant is financially unable to pay the fees of the witness and, 2) the presence of the witness is necessary to an adequate defense. This provision is liberally construed. See United States v. Sims, 637 F.2d 625 (9th Cir. 1980).

Rule 17(b) also states that:

If the court orders the subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed on behalf of the government.

3. Defendant's indigence has already been established.

4. The following witnesses, Jordan Lowe, Gordon Horiye, Ty

Torco and Gery Graham, Special Agents with the U. S. Department of Justice, Bureau of Alcohol, Tobacco & Firearms, for the District of Hawaii, are necessary to the defense because they will provide critical evidence on behalf of the Defendant at the Motion to Suppress Evidence and Statements.

Such testimony in this case is critical for the Defendant for the following reasons:

(a) All of these Federal law enforcement officers were present at the Defendant's residence on December 19, 2002, when it was searched.

(b) All of these officers interacted in some way with Defendant, at his residence, on that date.

(c) That the Defendant is facing a maximum of ten years incarceration. Therefore, the ability of the Defendant to present an effective

defense is essential. Failure to permit the Defendant to present these witnesses would violate his Fifth and Sixth Amendment rights to due process and compulsory process.

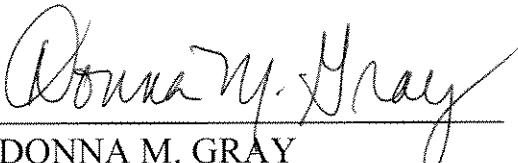
5. The witnesses being necessary to provide an adequate defense in this case herein, the defense requests the Court to issue the attached order authorizing the service of subpoenas.

6. The Defendant asks that these subpoenas be issued in full for all the reasons set forth in the attached affidavit or in part, as limited by the Court, if the Court determines that some of the requested material or information is unwarranted.

7. Since the witnesses are Department of Justice employees, an affidavit has also been attached to this application which details the nature of the questioning and the documents sought, as required by and pursuant to 28 C.F.R. § 16.22, et seq. If the Court grants these subpoenas, counsel will serve a copy of the subpoena and the affidavit upon Jordan Lowe, Gordon Horiye, Ty Torco and Gery Graham, as required. The Defendant will comply with the CFRs even though counsel believes they are unconstitutional.

I DECLARE UNDER PENALTY OF PERJURY THAT THE
FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY
KNOWLEDGE AND BELIEF.

DATED: Honolulu, Hawaii, September 10, 2003.



DONNA M. GRAY
Attorney for Defendant
JOHN ANDREW GILBREATH

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,) CR. NO. 03-00106 DAE
)
Plaintiff,) AFFIDAVIT OF COUNSEL
)
vs.)
)
JOHN ANDREW GILBREATH,)
)
Defendant.)

)

AFFIDAVIT OF COUNSEL

State of Hawaii)
)
) SS:
City and County of Honolulu)
)

DONNA M. GRAY, being first sworn under oath, deposes and says:

1. That I am the attorney for John Andrew Gilbreath, the defendant in the case of United States v. John Andrew Gilbreath, Cr. No. 03-00106 DAE.

2. That your affiant intends to subpoena Jordan Lowe, Gordon Horiye, Ty Torco and Gery Graham, Special Agents with the U. S. Department of Justice, Bureau of Alcohol, Tobacco & Firearms, for the District of Hawaii, as witnesses to testify at Defendant's Motion to Suppress Evidence and Statements

scheduled hearing on September 18, 2003 at 9:00 a.m., before the Honorable David A. Ezra.

3. That Special Agent Jordan Lowe will be called to testify in relation to his conduct and observations on December 19, 2002, when he, along with a number of other ATF agents, went to John Gilbreath's residence shortly after daybreak without either a search warrant or an arrest warrant. Agent Lowe also questioned Mr. Gilbreath after gaining access to the residence. Agent Lowe, along with other ATF agents, eventually obtained John Gilbreath's signature on a consent to search form on December 19, 2002.

4. That Special Agent Gordon Horiye will be called to testify in relation to his conduct and observations on December 19, 2002, when he, along with a number of other ATF agents, went to John Gilbreath's residence shortly after daybreak without either a search warrant or an arrest warrant. Agent Horiye will be called to testify to the exact nature and extent of his interactions with John Gilbreath on that date that resulted in obtaining a statement from John Gilbreath.

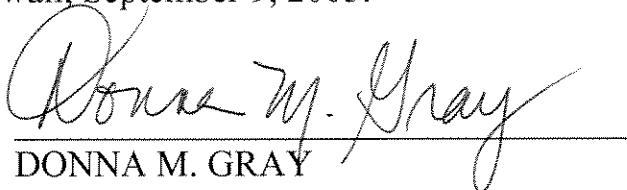
5. That Special Agent Ty Torco will be called to testify in relation to his conduct and observations on December 19, 2002, when he, along with a number of other ATF agents, went to John Gilbreath's residence shortly after

daybreak without either a search warrant or an arrest warrant. Agent Torco had John Gilbreath sign an ATF F 3400.23, which is a receipt for property seized. During that process he questioned Gilbreath about the items on the receipt.

6. That Special Agent Gery Graham will be called to testify in relation to his conduct and observations on December 19, 2002, when he, along with a number of other ATF agents, went to John Gilbreath's residence shortly after daybreak without either a search warrant or an arrest warrant. Agent Graham took a pre-search and post-search video of the residence, as well as photographs of the evidence seized as a result of the search.

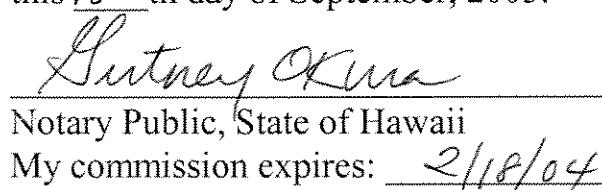
FURTHER AFFIANT SAYETH NAUGHT.

DATED: Honolulu, Hawaii, September 9, 2003.



DONNA M. GRAY

Subscribed and sworn to before me
this 10 th day of September, 2003.



Courtney Okuna
Notary Public, State of Hawaii
My commission expires: 2/18/04

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 03-00106 DAE
)	
Plaintiff,)	PROPOSED ORDER TO
)	SUBPOENA WITNESSES
vs.)	
)	
JOHN ANDREW GILBREATH ,)	
)	
Defendant.)	
)	

PROPOSED ORDER TO SUBPOENA WITNESSES

Defendant John Andrew Gilbreath, through counsel, DONNA M. GRAY, having moved this Court pursuant to Federal Rule of Criminal Procedure § 17 and 28 C.F.R. § 16.22, et seq., for an order issuing subpoenas to Special Agents Jordan Lowe, Gordon Horiye, Ty Torco and Gery Graham, for their appearance on September 18, 2003, at 9:00 a.m. to testify at a hearing on Defendant's Motion to Suppress Evidence and Statements as set forth in counsel's affidavit to this motion, said application for subpoenas is hereby GRANTED.

Counsel for the Defendant is hereby directed to serve Special Agents Jordan Lowe, Gordon Horiye, Ty Torco and Gery Graham, Department of Justice, Bureau of Alcohol, Tobacco & Firearms, 300 Ala Moana Boulevard, Honolulu, with the subpoenas and with the aforementioned affidavit so that they may have an



opportunity to object or, if no objection is to be filed, to comply with the order of the Court as directed.

IT IS SO ORDERED:

DATED: Honolulu, Hawaii, _____.

United States District Judge
District of Hawaii

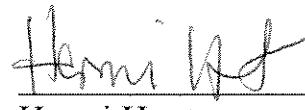
CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document was duly mailed and/or hand-delivered to the following:

THOMAS MUEHLECK
Assistant United States Attorney
PJKK Federal Building
300 Ala Moana Boulevard, Room 6100
Honolulu, Hawaii 96813

Attorney for Plaintiff
UNITED STATES OF AMERICA

DATED: Honolulu, Hawaii, September 10, 2003.



Hermi Hunt